BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, EXELON CORORPATION, PEPCO HOLDINGS INC., PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *Del.* C. §§ 215 AND 1016 (FILED JUNE 18, 2014)	)))))))))	PSC DOCKET NO. 14-193

MOTION FOR CEASE AND DESIST ORDER RESTRAINING THE DELAWARE DIVISION OF PUBLIC ADVOCATE FROM TAKING ACTIONS ANTAGONISTIC TO THE AMENDED SETTLEMENT AGREEMENT

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Intervenor Jeremy Firestone hereby Moves the Commission to enter a **Cease and Desist Order restraining the Delaware Division of Public Advocate from taking actions antagonistic to the Amended Settlement Agreement.**

Summary

1. On or about February 13, 2015, the Joint Applicants, the Public Service Commission (PSC) Staff, the Delaware Division of Public Advocate (DPA), the Delaware Department of Natural Resources and Environmental Control (DNREC), the Sustainable Energy Utility (SEU), Clean Air Council (CAC), and Mid-Atlantic Renewable Energy Coalition (MAREC) entered into a Settlement Agreement and filed such Agreement with the Commission in this matter.

2. Subsequently, on April 7, 2014, in exchange for changes to the Settlement Agreement, which were incorporated into an Amended Settlement Agreement (ASA), I agreed not to cease the pursuit of my substantive claims and my procedural due process claims on and related to the merits of the merger and settlement agreement.

3. The ASA in ¶84 requires Delmarva Power to issue a series of requests for proposals (RFPs) to purchase three tranches of renewable energy credits (RECs) (2017-18; 2019-2020; and 2023-24), with each purchase being from the equivalent of 40 MW of nameplate capacity.

4. 26 Del Code §354 provides that under certain circumstances, DNREC, in consultation with the Commission, may freeze the percentage of RECs required that Delmarva Power is required to hold.

5. DNREC is in the process of promulgating rules related thereto.

6. On or about October 2, 2015, DPA, without notice to the parties to this docket or to the DNREC rulemaking docket, attempted before this Commission to collaterally attack DNREC's ongoing rulemaking—that is, prior to final agency action. That attempt was rebuffed.

7. On or about November 13, 2015, DPA filed comments in DNREC's rulemaking proceeding, which are appended as Attachment 1. In short, in those comments, DPA (p. 15) asserts that a "freeze should be implemented now." DPA's assertion and its actions in DNREC's rulemaking docket and more generally before this Commission are antagonistic and adverse to, and attack, rather than defend, the ASA.

Argument

8. In ¶ 1 of the ASA, the Settling Parties proclaim that "the record herein, coupled with the conditions set forth herein support findings and conclusions by the Commission that the Merger is in accordance with law, for a proper purpose and is consistent with the public interest."

9. ¶ 108 of the ASA provides that the Settling Parties "agree to support approval … upon the terms set forth" therein and "to defend this Settlement Agreement…."

10. ¶ 110 provides that the ASA is binding upon the Settling Parties and that:

> This Settlement Agreement contains terms and conditions … each of which is interdependent with the others and essential in its own right to the signing of this Settlement Agreement. Each term is vital to the Settlement Agreement as a whole, since the Settling Parties expressly and jointly state that they would not have signed the Settlement Agreement had any term been modified in any way.

(emphasis added).

11. On December 2, 2015, I wrote an email to DPA informing it of my concerns with its actions, which are antagonistic to and attack the ASA—effectively a cease and desist letter. Ms. Iorii on behalf of DPA responded on December 3.

12. In pertinent part, Ms. Iorii claimed DPA's actions were protected by ¶ 110 of the ASA, which includes the following savings provision: "None of the Settling Parties shall be prohibited from or prejudiced in arguing a different policy or position before the Commission in any other proceeding, as such agreements pertain only to this matter and to no other matter." See Attachment 2.

13. Ms. Iorii also claimed DPA's actions were allowed under ¶ 84 of the ASA because DPA's REC cost cap comments only addressed REC compliance years 2014-15 and 2015-16 and the first tranche is not until compliance year 2017-18. Id.

14. In addition, Ms. Iorii (id) claimed that ¶ 84 anticipated this very sort of circumstance. Id. Paragraph 84 provides:

> The Settling Parties agree that if circumstances or conditions change (including but not limited to a material change in the projected load of Delmarva Power such that fewer RECs are required, or a substantial change in the cost of RECs through the spot market such that additional spot-market purchases in lieu of long-term contract purchases would be prudent), they will work in good faith with each other and present any proposed modification to the Commission as may be warranted by those changed conditions.

15. Finally, Ms. Iorii raised the uncontroversial (and irrelevant) argument that the ASA cannot supersede the Delaware Code. Id.

16. In a further attempt to resolve this matter without resort to the Commission, I replied to Ms. Iorii, addressing each and every one of her contentions. Id.

17. First, regarding DPA's reliance on ¶ 110 of the ASA to support its actions before DNREC, it is important to note that the savings provision quoted above by its own terms applies only to actions "before the Commission" and thus provides DPA no safe harbor for its actions before DNREC.

18. Moreover, even as applied to proceedings before the Commission, ¶ 110's savings provision was clearly not intended to allow a settling party to collaterally attack a provision in the ASA.

19. What ¶ 110's savings provision allows and does not allow can be seen in the following examples:

a. It would not allow a settling party to collaterally attack, the undertaking of the onshore wind or natural gas studies (ASA, ¶ 9) in another proceeding before the Commission, but it would allow a settling party to argue that, notwithstanding its agreement that such studies should be undertaken, it opposed new natural gas or onshore wind facility siting or expenditures arising out of actually securing new natural gas or onshore wind generation or the signing of PPAs related thereto should those studies lead others to conclude that there is merit to such new generation/PPAs.

b. Under ¶ 81 of the ASA, Delmarva Power is bound to undertake a depreciation study, and a settling party could not collaterally attack that obligation. However, notwithstanding the requirement that Delmarva Power undertake that study, any settling party would remain free to argue the implications of that study in the next rate base.

c. In ¶ 82 of the ASA, the settling parties commit to closing docket 13-152 given SAIDI and budget commitments specified in the ASA. A settling party could not turn around in docket 13-152 and take a position that was opposite to

the ASA (and oppose the closing of such docket) simply because its argument is being made in another docket.

20. The examples provided are representative; they are not exhaustive. But from a review of these examples, it is apparent that if each settling party is permitted as DPA contends to collaterally attack the settlement in any other forum, including Commission dockets, under the guise of taking a different position or policy, there is in fact no ASA.

21. DNREC's proposed definition of the word "freeze" in the cost cap rules refers to a "suspension" of the annual increase. http://regulations.delaware.gov/register/november2015/proposed/19%20DE%20Reg%20397%2011-01-15.pdf. The implication of DNREC's proposed rule is that the REC requirements are not only frozen during the pendency of the freeze, but that the freeze postpones future increases as well.[1] Under such a view, a freeze in the 2014-2015 or the 2015-2016 compliance years, as advocated by DPA, is adverse to the ASA REC tranches even though the first tranche does not commence until 2017-2018: Take the statutory minimum requirements in 2014 (11.5%); (2015 (13%), 2016 (14.5%), 2017 (16%), and 2018 (17.5%). If a freeze is put in place in 2015 and lifted in 2016, compliance in 2017 would be at 14.5% rather than at 16%, thus jeopardizing the first tranche. Because these postponements would be carried through to later years, DPA's actions are also adverse to the second and third tranches.

[1] I take a different position—that is, that the word "freeze" should be defined in a manner that sets (freezes) the REC percentage in place unless and until the freeze is lifted, at which time the REC percentage required would correspond to those set forth by the General Assembly for a given year in 26 Del Code 354(a)—that is, 26 Del Code 354(a) simply resumes.

22. We can all agree that the law is the law. Thus, if for example, a court were to issue an order freezing the RECs requirements and if such REC freeze were to impact a REC tranche—a "changed circumstance" under ¶ 84, then pursuant to that paragraph, the parties will have to figure out what it means for that REC tranche. But it is a different matter when a settling party to the ASA attacks rather than defends the ASA and affirmatively (and in this case on more than one occasion in more than one forum) seeks to implement a REC freeze and an interpretation of the law that, if successful, would place in jeopardy an integral part of the ASA.

23. Ironically, DPA claims that DNREC is over-stepping its authority in promulgating the cost cap regulations, while it is DPA that is without statutory authority to raise such a claim before DNREC. Under 29 Del Code § 8716, while DPA may make advisory recommendations to the Governor, the Secretary of State or the General Assembly and while DPA may appear in matters before the Commission, in state and federal courts, and before "federal" administrative agencies and commissions, DPA's recommendation powers and its authorization to appear do not extend to other state agencies. As such, DPA's actions before the DNREC are beyond its statutory authority and *ultra vires*.

24. It is plausible that when DPA previously made its positions known on the REC cost cap before the Commission and DNREC, it did not fully appreciate the implications of its actions in those fora. Now, however, there appears little doubt that the Public Advocate's animus toward the renewable portfolio standards is leading it to undertake actions antagonistic to the ASA.

25. Although I am not presently a party to the ASA—I did represent a couple of months ago to Exelon's counsel that if further amendments to the settlement to incorporate changes to reflect proceedings in the District of Columbia were fairly implemented I would likely join the settlement—my agreement to not further pursue my due process claims and my substantive claims related to the merger and settlement were premised on the ASA and certain integral provisions, including those concerning renewable energy and energy efficiency. DPA's unlawful actions severely undercut the premise upon which my agreement to not further pursue claims was based.

WHEREFORE, for the reasons set forth above, Jeremy Firestone requests this Commission at its meeting on January 5, 2016 to:

1. Grant this Motion;
2. Enter a Restraining Order that requires the Delaware Division of Public Advocate to Cease and Desist from taking actions contrary to the Amended Settlement Agreement; and
3. Grant such other relief as is appropriate and just.

Respectfully submitted,

Jeremy Firestone
December 11, 2015

ATTACHMENT 1

COMMENTS OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE ON PROPOSED RULES TO IMPLEMENT 26 *DEL. C.* §§354(i) AND (j) PROMULGATED BY THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

The Delaware Division of the Public Advocate ("DPA") hereby submits the following comments ("Comments") regarding the Department of Natural Resources and Environmental Control's ("DNREC") proposed rules (the "2015 Revised Rules") published November 1, 2015 titled "Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions."

I. Introduction.

In 2010, the General Assembly amended Section 354 of the Renewable Energy Portfolio Standards Act ("REPSA") to add provisions allowing for a freeze of the minimum renewable energy purchase requirements for regulated utilities under certain circumstances:

> (i) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative solar photovoltaics requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 1% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from solar photovoltaics shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% threshold. The total cost of compliance shall include the costs associated with any ratepayer funded state solar rebate program, SREC purchases, and solar alternative compliance payments.
>
> (j) The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative Eligible Energy Resources requirement for regulated utilities if the Delaware Energy Office determines that the total cost of complying with this requirement during a compliance year exceeds 3% of the total retail cost of electricity for retail electricity suppliers during the same compliance year. In the event of a freeze, the minimum cumulative percentage from Eligible Energy Resources shall remain at the percentage for the year in which the freeze is instituted. The freeze shall be lifted upon a finding by the Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 3% threshold. The total cost of compliance shall include the costs

> associated with any ratepayer funded state renewable energy rebate program, REC purchases, and alternative compliance payments.

The amendments to REPSA also included an amendment to 26 *Del. C.* §362 by adding subsection (b). That subsection provides:

> For regulated utilities, the Commission shall further adopt rules and regulations *to specify the procedures for freezing the minimum cumulative solar photovoltaic requirement as authorized under § 354(i) and (j) of this title,* and for adjusting the alternative compliance payment and solar alternative compliance payment as authorized under § 358(d)(4) and (e)(3) of this title.

26 *Del. C.* §362(b) (emphasis added).

Despite being given the authority to promulgate regulations to implement the requirements of 26 *Del. C.* §§354(i) and (j), the Public Service Commission ("Commission") has taken no concrete steps to do so. Rather, it has impermissibly ceded its statutory authority to do so to DNREC.

In April 2012, DNREC published the first proposed regulations purporting to implement Sections 354(i) and (j). Those proposed regulations were roundly criticized. DNREC withdrew them and went back to the drawing board.

In late 2014, DNREC proposed revised regulations (the "2014 Proposed Rules"). The 2014 Proposed Rules again included the provisions that drew opposition the first time. They also stated that the comparison would be based on the costs on a year-over-year comparison rather than a comparison of costs for "the same compliance year" as Sections 354(i) and (j) specifically provide.

The 2014 Proposed Rules also engendered significant criticism, including from the DPA. The DPA primarily argued that: (1) DNREC did not have the statutory authority to promulgate rules on the issue; (2) even if DNREC did have such authority, the 2014 Proposed Rules erroneously provided that the comparison was a year-over-year comparison rather than a same-year comparison; (3) even if DNREC did have such authority, it had exceeded its authority by adding criteria for calculating costs that the statutes did not include, and was therefore rewriting the statutes in the form of the regulations; (4) even if DNREC did have such authority, it ignored the role of the Commission, which the General Assembly expressly included in the statutes; and (5) even if DNREC did have such authority, the 2014 Proposed Rules were opaque as to what would inform DNREC's judgment and therefore had the potential to be applied arbitrarily and capriciously.

After receiving the comments on the 2014 Proposed Rules, DNREC withdrew them from the Hearing Officer's consideration and went back to work. On October 1, 2015, it published revised proposed rules. However, it later notified interested persons that it had inadvertently submitted the wrong rules for publication, and that it would submit the correct proposed rules for publication in the November Register of Regulations.

On November 1, 2015, DNREC published the current version of the revised regulations ("2015 Revised Rules"). The hearing record will close on December 1, 2015, and the Hearing Officer will hold a public comment session on November 23, 2015.

In what appears to be a concession that the Commission has a statutorily-delegated role in declaring a freeze of the renewable energy requirements, the 2015 Revised Rules include consultations with the "staff of the PSC" in determining whether a freeze should be implemented or lifted and in declaring such a freeze or the lifting thereof. While that is a move in the right direction, the Commission Staff is not the appropriate body with whom the consultation is to occur. The correct body is the Commission itself.

Furthermore, in the 2015 Revised Rules, DNREC removed all references to Qualified Fuel Cell Provider ("QFCP") and Qualified Fuel Cell Provider Project ("QFCPP") that had been in the first iteration of the proposed rules and 2014 Proposed Rules.

The 2015 Revised Rules contain many of the same provisions to which the DPA and others have objected. DNREC ignored those arguments. As we will show, the 2015 Revised Rules cannot pass legal muster any more than the 2014 Proposed Rules could, and for many of the same reasons. The DPA therefore respectfully requests the Hearing Officer to reject them.

II. The 2015 Revised Rules Are Void *Ab Initio* Because The Commission, Not DNREC, Has the Authority to Promulgate the Rules That Will Determine the Procedures for Freezing the RPS Requirements.

The DPA made this argument in opposing the 2014 Proposed Rules. DNREC ignored it. The DPA and the Caesar Rodney Institute ("CRI") filed petitions with the Commission asking it to reopen its rulemaking docket to promulgate rules specifying the procedures for freezing the solar and other renewable energy requirements pursuant to its authority to do so as provided in 26 *Del. C.* §362(b). On November 3, 2015, the Commission heard oral argument and voted not to reopen its rulemaking docket. The DPA submits this argument in this rulemaking proceeding so as not to be deemed to have waived it in the event that the DPA appeals any rules that come out of this proceeding.

DNREC claims that the authority supporting these regulations is 26 *Del. C.* §§354(i) and (j). Those subsections do require the Commission and DNREC's Division of Energy and Climate to consult together to determine whether a freeze should be implemented, and if so, whether it should subsequently be lifted. And those sections further state that DNREC will determine whether the 3% and 1% cost caps have been reached. But those are steps 2 and 3. The *first* step is promulgating the regulations that specify *how* the cost of compliance with the renewable energy mandates and the total retail cost of electricity are calculated. *That* is the authority that DNREC believes it has. And *that* is the authority that the DPA believes belongs solely to the Commission pursuant to the clear language of 26 *Del. C.* §362(b). That section, which was added to the REPSA at the same time as sections 354(i) and (j), provides:

> For regulated utilities, the Commission shall further adopt rules and regulations *to specify the procedures for freezing the minimum cumulative solar photovoltaic requirement as authorized under § 354(i) and (j) of this title,* and for adjusting the alternative compliance payment and solar alternative compliance payment as authorized under § 358(d)(4) and (e)(3) of this title.

(Emphasis added). Section 352(2) of the REPSA defines "Commission" as the Delaware Public Service Commission, *not* DNREC.

The goal of statutory construction is to give effect to the General Assembly's intent. *Zambrana v. State*, 118 A.3d 775, 776 (Del. 2015); *Terex Corp. v. Southern Track & Pump, Inc.*, 117 A.2d 537, 543 (Del. 2015). The General Assembly could have given that authority to DNREC in the REPSA, since DNREC is a defined term in the REPSA and DNREC is specifically assigned other responsibilities in the REPSA. But it did not. The General Assembly clearly intended to entrust the authority to promulgate regulations governing the procedures for freezing the renewable energy requirements to the Commission, not to DNREC.[1],[2]

Furthermore, the statute does not give the Commission authority to delegate its responsibility for specifying the procedures for freezing the RPS requirements to DNREC, and the Commission cannot delegate its authority *sua sponte*. *See, e.g., Matador Pipelines, Inc. v. Oklahoma Water Resources Board*, 742 P.2d 15 (Okla. 1987) (agency cannot delegate statutory duty to other agencies); *Lake Isabella Development, Inc. v. Village of Lake Isabella,* 674 N.W.2d 40 (Mich. Ct. App. 2003) (agency could not delegate authority to municipality); *Booker Creek Preservation Inc. v. Southwest Florida Water Management District*, 534 So.2d 419 (Fla. Dist. Ct. App. 5th Dist. 1988) (agency cannot delegate statutory duty to other agencies). The Commission's attempt to do so in its regulations is void, and since DNREC does not have the statutory authority to jump into the breach left by the Commission, any regulations issued by it are void *ab initio* and unenforceable.

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[1]Section 362(b) does not specifically identify "eligible energy resources" as subject to the Commission's regulation, but it *does* explicitly refer to both sections 354(i) and (j). And Section 354(j) addresses eligible energy resources. Therefore, the DPA concludes that the General Assembly did in fact include both types of renewable energy resources as subject to regulation by the Commission with respect to establishing procedures for freezing the REPSA requirements.

[2]The Commission did issue regulations, but they do not specify procedures for freezing the REPSA requirements. *See* 26 *Del. Admin. C.* Part 3008 – Rules and Procedures to Implement the Renewable Energy Portfolio Standard. Indeed, Section 3008-3.2.21 delegates the responsibility for issuing procedures to implement 26 *Del. C.* §§354(i) and (j) to DNREC. As discussed *infra*, such delegation is impermissible and invalid.

III. Sections 5.2, 5.3, 6.1 and 7.3: The Statutorily-Required Consultation Between DNREC and "the Commission" Is With the Commission Itself, Not Its Staff – And Because the Commission Must Transact Public Business at an Open Meeting, the Consultation With the Commission Must Occur at a Public Meeting.

This is one of three substantive differences between the 2014 Proposed Rules and the 2015 Revised Rules.[3]

Sections 354(i) and (j) explicitly require DNREC to consult with "the Commission" with respect to declaring and lifting a freeze of the minimum renewable requirements. In the 2015 Revised Rules, DNREC finally acknowledges that the General Assembly did not give it *carte blanche* to declare and lift freezes. Sections 5.3, 5.3, 6.1 and 7.3 of the 2015 Revised Rules provide that DNREC will consult with the "staff of the PSC" with respect to freezing the requirements and lifting the freeze.

As noted previously, the REPSA defines the "Commission" as the "Delaware Public Service Commission." 26 *Del. C.* §352(2). It does not define the Commission as the Commission "Staff." In this regard, we note that although the REPSA defines "DNREC" as the "Delaware Department of Natural Resources and Environmental Control," it also includes provisions specifying certain functions within DNREC as having particular responsibilities (i.e., the State Energy Coordinator; the Secretary). Clearly, then, the General Assembly knew how to assign responsibilities to entities other than DNREC, and if it had wanted to assign the consultation responsibility to the Commission Staff, it knew how to do so.

DNREC's insertion of the word "staff" in the 2015 Revised Rules, when it does not appear anywhere in the statute, seems to be intended to circumvent the public notice and open meeting requirements of the Freedom of Information Act ("FOIA") that apply to the Commission.

Section 10001 of the FOIA declares the State's policy:

> *It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy*; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.

29 *Del. C.* §10001 (emphasis added).

[3]The second substantive change is discussed in Section IV. The final substantive difference between the 2014 Proposed Rules and the 2015 Revised Rules is that DNREC apparently has bowed to opponents' arguments that the appropriate comparison is the same compliance year, not the previous compliance year. Thus, proposed Rules 5.2 and 5.3 no longer contain the phrase "over the previous compliance year."

Section 10001(h) of the FOIA defines a "public body" as"

> ... any regulatory, *administrative*, advisory, executive, appointive or legislative *body of the State*, or of any political subdivision of the State, *including, but not limited to, any* board, bureau, *commission, department, agency*, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:
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> (1) Is supported in whole or in part by any public funds; or
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> (2) Expends or disburses any public funds, including grants, gifts or other similar disbursals and distributions; or
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> (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.

Id. §10002(h) (emphasis added).

Section 10004(a) of the FOIA provides that "[e]very meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section."[4] *Id.* §10004(a).

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[4]FOIA Section 10004(b) provides that a public body may call for an executive session closed to the public only for the following purposes:" (1) to discuss an individual citizen's qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open; (2) for preliminary discussions on site acquisitions for any publicly funded capital improvements, or sales or leases of real property; (3) activities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension; (4) strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body; (5) discussions which would disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor; (6) discussion of the content of documents, excluded from the definition of "public record" in § 10002 of this title where such discussion may disclose the contents of such documents; (7) student disciplinary cases (unless the student requests a public hearing); (8) employee disciplinary or dismissal hearings (unless the employee requests a public hearing); and (9) personnel matters in which the names, competency and abilities of individual employees or students are discussed (unless the employee or student requests that such a meeting be open). 29 *Del. C.* §10004(b)

FOIA Section 10004(c) sets forth the procedures for entering into executive session. *Id.* §10004(c).

FOIA Section 10004(d) provides that a person who is willfully and seriously disrupting the conduct of a public meeting may be removed from that meeting. *Id.* §10004(d).

Section 10002(g) of the FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing." *Id.* §10002(g).

The Commission is a public body as defined in 29 *Del. C.* §10001(h). Consulting with DNREC regarding whether to implement or lift a freeze of the minimum renewable energy requirements is public business. Because the FOIA requires the Commission to transact public business in open meetings, any consultation with DNREC regarding whether to implement or lift a freeze must be done in an open meeting.

26 *Del. C.* §§354(i) and (j) specifically require DNREC to consult with the *Commission* – not the Commission Staff – in determining whether to implement or lift a freeze. DNREC cannot change that statutory requirement by consulting with the Commission Staff. Thus, the consultation requirement contained in Sections 5.2, 5.3, 6.1 and 7.3 must be changed to reflect that the consultation must be with the *Commission.*

IV. Sections 2.0, 4.2 and 4.3: Assuming *Arguendo* That DNREC Has the Authority to Promulgate Regulations to Implement 26 *Del. C.* §§354(i) and (j), DNREC's Removal of "Qualified Fuel Cell Provider" and "Qualified Fuel Cell Provider Project" From the Definitions, and the Concomitant Removal of QFCP Offsets From the Calculation of the Renewable Energy Costs of Compliance: (A) Directly Contradicts Representations DNREC Has Made in Proceedings Before the Commission; (B) Is Inconsistent With How the Costs of Renewable Compliance Have Been Presented on Delmarva's Customers' Bills; and (C) Artificially Reduces the Cost of Compliance for Renewable Energy.

In 2011, the State of Delaware reached an agreement with Diamond State Generation Partners, LLC ("Diamond State") whereby Diamond State would locate a fuel cell manufacturing facility in Delaware. As part of that agreement, the General Assembly significantly amended the REPSA to provide that Delmarva Power & Light Company ("Delmarva" or "DPL") would purchase up to 50 MW of output from the fuel cells manufactured in Delaware. In connection with this agreement, the General Assembly amended the REPSA to provide that the energy provided by the qualified fuel cell provider project ("QFCP" and

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Finally, FOIA Section 10004(h) identifies proceedings that are excluded from the open meeting requirement: grand, petit and special juries; the deliberations of any court; the Board of Pardons and Parole; public bodies having only one member; public bodies within the legislative branch of the state government other than the House of Representatives, the Senate, the Joint Finance Committee, the Joint Committee on Capital Improvement, the Joint Sunset Committee, Legislative Council, committees, excluding ethics committees, specifically enumerated and created by Resolution of the House of Representatives and/or Senate or task forces specifically enumerated and created by Resolution of the House of Representatives and/or Senate; certain Victims' Compensation Assistance Program Appeals Board proceedings; and deliberations of the State Human Relations Commission, Industrial Accident Board, Tax Appeals Board, and Victims' Compensation Assistance Program Appeals Board for any case decision governed by the Administrative Procedures Act. 29 *Del. C.* §10004(h).

"QFCPP") can be used to fulfill Delmarva's renewable energy credit ("REC") and solar renewable energy credit ("SREC") requirements. *See* 26 *Del. C.* §353(d). Thus, in exchange for Delmarva being required to purchase the energy output from a QFCP (and for Delmarva customers being required to pay for that energy), Delmarva may use that energy purchase to reduce the amount of RECs and SRECs it would otherwise have to purchase.

In the 2014 Proposed Rules, DNREC included definitions for "Average QFCP Project offset cost" and "Qualified fuel cell provider project." Those definitions have been removed from the 2015 Revised Rules.

The 2014 Proposed Rules also included "the cost of QFCPP offsets" in Sections 4.2 and 4.3 as part of the Renewable Energy Cost of Compliance and the Solar Renewable Energy Cost of Compliance. This was appropriate because Section 353(d) provides that energy produced by qualified fuel cell provider projects can be used to fulfill the REPSA requirements at a rate of 1 REC for every MWh of energy generated, and a ratio of 6 MWh of RECs per 1 MWh of SRECs. 26 *Del. C.* §353(d). These provisions have been removed from the 2015 Revised Rules.

In other proceedings, DNREC has specifically recognized that Delmarva uses the energy purchased from the QFCP to satisfy its REC and SREC requirements as permitted by 26 *Del. C.* §353(d). Its current proposal to remove any mention of the QFCP Project and the QFCP offsets directly contradicts the position that DNREC took in PSC Docket No. 13-250, and directly contradicts the manner in which the cost of renewable compliance has been presented to Delmarva customers, both on their bills and on Delmarva's website.

Docket No. 13-250 commenced with three state legislators asking the Commission to break out certain costs being paid by Delmarva customers in individual line items on Delmarva's customers' bills. One of those costs was the cost of the QFCP Project. During workshops conducted in that docket, Delmarva proposed to identify renewable compliance charges, Green Energy Fund costs, and Low Income charges separately. Delmarva's proposal noted that the July 1, 2014 implementation date was dependent on achieving the parties' consensus and Commission approval by April 29, 2014, and further stated that "'[c]onsensus must include DNREC, due to the currently ongoing DNREC rulemaking proceeding for the purpose of determining the cost of the Renewable Portfolio Standard compliance … .'" *See In the Matter of the Legislative Petition for Review and Recommendations on Delmarva Power & Light Company Utility Bill Transparency* (Filed June 20, 2013), Docket No. 13-250, Order No. 8556 (April 29, 2014) at Exhibit A, p. 2.

DNREC originally opposed separately identifying *any* renewable compliance costs on customers' bills, but ultimately did not object to Delmarva's proposal because DNREC was "partially satisfied that the language on the bill and the accompanying website were helpful in providing meaningful information for customers." Docket No. 13-250, Letter dated September 8, 2015 from Thomas A. Noyes, DNREC's Principal Planner for Utility Policy, Division of Energy and Climate, to Jason R. Smith, Case Manager (hereafter "September 8 Letter"), p. 1.[5] Thus, the consensus that Delmarva sought was achieved. And DNREC reiterated that consensus before the Commission on April 29, 2014:

[5]The September 8 Letter is attached as Exhibit A.

> I would like to point out that DNREC favors bill transparency as the one agency tasked with informing the public of the cost of RPS compliance. ... And DNREC is finalizing regulations on that.
>
> But part of that regulation is, we have the duty by statute to tell people what the RPS costs.
>
> So, one of our concerns has been, *let's try and make the reporting as consistent from one thing to the next*. And we will be working with the parties going forward to harmonize that.

(Docket No. 13-250, April 29, 2014 Transcript at 354-55) (emphasis added).[6]

The Commission approved Delmarva's proposal as submitted (and attached it to its Order),[7] but held the docket open to allow for the parties to determine if any additional charges could be further broken out on customers' bills.

As a result of Order No. 8556, Delmarva's website has contained the following description of the renewable compliance charge since approximately July 2014:

> RESPA [sic] compliance is achieved through three general categories of clean energy generation: (1) solar, (2) general renewable energy resources, and (3) Delaware Qualified Fuel Cells.
>
> 1. Solar: Solar energy (also known as "photovoltaic energy") is electrical energy created by converting the sun's energy to electricity. RESPA [sic] provides that a certain minimum percentage of total RESPA compliance must come from solar energy sources.
>
> 2. General Renewable Energy: In addition to solar, RESPA [sic] defines renewable energy as coming from various sources, including: wind energy, tidal and wave energy, geothermal energy, hydroelectric energy, methane capture and other resources.
>
> 3. Delaware Qualified Fuel Cells: In 2011, REPSA was amended to permit the use of generation from certain fuel cells to achieve REPSA compliance. REPSA refers to these fuel cells as "Qualified Fuel Cells." Qualified Fuel Cells must (1) be manufactured in Delaware and (2) be capable of being powered by renewable fuels. A company known as Bloom Energy met the requirements to be a Qualified Fuel Cell provider in Delaware by building a new fuel cell assembly plant in Newark, Delaware and building two fuel cell generation sites in Delaware. The Qualified Fuel Cells in Delaware manufactured by Bloom Energy

[6]The pertinent pages of the transcript are attached as Exhibit B.

[7]Commission Order No. 8556 is attached as Exhibit C.

are currently used to meet approximately 50% of the Delaware RESPA compliance requirements.

* * *

The Renewable Compliance Charge, which appears within the Delivery Charge section of Delmarva Power's bills, represents the cost Delmarva Power incurs in meeting the requirements of the Renewable Energy Portfolio Standards Act (or "REPSA"). *This charge includes costs of clean energy generation discussed above: (1) solar and general renewable energy, and (2) Delaware Qualified Fuel Cells.*

1. Solar and General Renewable Energy: The monthly costs of purchases from solar and general renewable energy sources are established annually after review and approval by the Delaware Public Service Commission.

2. Delaware Qualified Fuel Cells: The monthly cost of purchases from Delaware Qualified Fuel Cells is established on a monthly basis after review and approval by the Delaware Public Service Commission. You can find the monthly charges per kilowatt hour for the purchase of solar, general renewable energy resources and Delaware Qualified Fuel Cells for 2014 here.

http://www.delmarva.com/my-home/choices-and-rates/delaware/the-renewable-energy-portfolio-standards-act-and-the-renewable-compliance-charge/ (emphasis added).

Additionally, effective with bills rendered on and after July 1, 2015, Delmarva has included separate line items for the Low Income, Green Energy Fund, and Renewable Compliance charges. The Renewable Compliance charge that is separately broken out on customers' bills includes the three categories identified on Delmarva's website: solar, general renewable energy, and Delaware Qualified Fuel Cells.

In subsequent workshops in Docket No. 13-250, the main bone of contention was whether the QFCP costs should be identified separately on customers' bills. Delmarva and DNREC objected to identifying QFCP costs separately, and the parties were unable to reach consensus. After the conclusion of the workshops, Mr. Noyes stated DNREC's position that the QFCP costs should *not* be broken out separately from the renewable compliance charge already identified on customers' bills because there is a "relationship between QFCP costs and REPSA compliance costs." September 8 Letter at p. 2. He wrote that "*QFCP costs are incurred to meet a portion of DPL's RPS requirement*, which reduces the number of RECs and SRECs DPL needs to buy to meet the requirement." September 8 Letter at p. 2 (emphasis added). He concluded that "[r]ather than break all [sic] of the resources used for RPS compliance, DNREC sees it as appropriate to report REPSA compliance as one cost … ." *Id.*

The Docket No. 13-250 Case Manager was apparently persuaded by DNREC's position. In recommending that the Commission decline to identify the QFCP costs separately on customer bills, the Case Manager stated:

> The QFCP project is an item that is presently embedded in the Renewable Compliance Charge, which was already been removed from the Distribution Charge in Phase I to provide better clarity for the cost of compliance with Delaware's Renewable Energy Portfolio Standards Act ("REPSA"). At issue here is that the QFCP project is just one of many projects that encompass the Renewable Compliance Charge. Other projects include major wind projects, the Dover SunPark, the Delaware Solar Program and many more. Since the Renewable Compliance Charge involves a variety of energy sources, with projects on both a large and small scale, it is not feasible to list out every single project for disclosure on the bill. Singling out one particular project when there are many other projects that comprise the Renewable Compliance Charge does not appear to be in the Delmarva customers' best interests.

Docket No. 13-250, Staff Memorandum dated October 15, 2015 at 8.[8]

The Commission is scheduled to hear argument and deliberate in Docket No. 13-250 on December 3, 2015. If the Commission accepts the Case Manager's recommendation that no separate breakout of QFCP costs is required, its decision is likely to be based at least in part on DNREC's contention that the QFCP Project offsets/costs are included in the REPSA compliance costs.

DNREC has consistently taken the position that the QFCP offsets are costs of complying with the REPSA. It should not be heard to claim otherwise now. The only reason that it seeks to remove QFCP offset costs from the calculation of REPSA compliance costs in this iteration of the regulations (when all previous iterations included them as REPSA compliance costs and when it has consistently represented to the Commission that the cost of REPSA compliance includes QFCP offsets) is because doing so furthers its goal of ensuring that the REPSA compliance costs will never reach the thresholds for freezing the REPSA requirements.

In the absence of the legislatively-permitted offsets Delmarva would have to purchase RECs and SRECs to meet its obligations; therefore, the cost of the QFCP offsets should be included in calculating the cost of compliance with REPSA for purposes of determining whether the cost caps of Sections 354(i) and (j) have been met. Omitting these costs reduces the cost of REPSA compliance compared to the total retail cost of electricity for retail electric suppliers, and makes it appear that it costs less to comply with the REPSA than it actually does. Since the QFCP energy is used to satisfy Delmarva's renewable energy obligations, its cost must be included in calculating the REPSA compliance costs.

[8]The Case Manager's Memorandum is attached as Exhibit D.

V. Sections 2.0, 4.2, 4.3 and 4.4: Assuming *Arguendo* That DNREC Has the Authority to Promulgate Regulations to Implement 26 *Del. C.* §§354(i) and (j), The Proposed Rules' Definition of "Total Retail Costs of Electricity" Should Not Include the Costs of Transmission, Distribution or Delivery of Electricity – But If Those Functions Remain In the Definition, They Should Be Added to the Definition of "Renewable Energy Costs of Compliance" to Enable a Fair Comparison.

The DPA made this argument in opposing the 2014 Proposed Rules. DNREC ignored it.

DNREC's proposed definition of "Total Retail Costs of Electricity" includes costs associated with the transmission, distribution and delivery of electricity. This is improper. Sections 354(i) and (j) are concerned solely with *supply* of electricity, not with transmission, distribution or delivery of electricity. As a result of deregulation, those functions were unbundled. The "Total Retail Costs of Electricity" should include only those costs related to the supply function.

The DPA prefers removing the transmission, distribution and delivery costs from the definition of "Total Retail Costs of Electricity." That definition could instead be called "Total Retail Costs of Electricity Supply." We submit that this change more accurately reflects the statutory language (which is limited to renewable energy mandates) and certainly is more consistent with the intent of the sponsors of the amendments to Section 354, who emphasized over and over again that the sections provided a "circuit breaker" to protect ratepayers in the event the renewable energy mandates became too expensive (defined by the General Assembly as the 1% increase for solar and 3% for eligible energy resources).[9]

If DNREC is determined to include transmission, distribution and delivery costs in the "Total Retail Costs of Electricity," then transmission, distribution and delivery costs should also be included in the definition of "Renewable Energy Costs of Compliance" and in Sections 4.2 and 4.3 of the Proposed Rules. Since renewable energy also has to be transmitted, distributed and delivered, these costs are appropriately included in the definition *if* they are also included in the "Total Retail Costs of Electricity." Their inclusion would enable a true "apples to apples" comparison of "Renewable Energy Costs of Compliance" with "Total Retail Costs of Electricity" such that the only difference between the two would be the costs associated with the renewable energy mandates. Excluding transmission, distribution and delivery costs from the definition of "Renewable Energy Costs of Compliance" but including them in the definition of "Total Retail Costs of Electricity" will almost guarantee that the 1%/3% thresholds for implementing a freeze pursuant to the provisions of 26 *Del. C.* §§354(i) and (j) will never be reached.

VI. Sections 5.4-5.8: Assuming *Arguendo* That DNREC Has the Authority to Promulgate Regulations to Implement 26 *Del. C.* §§354(i) and (j), Sections 5.4 – 5.8 Must Be Deleted.

The DPA made these arguments in opposing the 2014 Proposed Rules. DNREC ignored them.

[9]The transcripts of the discussions in the House and Senate are attached as Exhibits E and F.

A. DNREC Has No Authority to Amend the Statutes to Include Factors That the Statutes Do Not Include In Determining Whether to Declare a Freeze.

Even assuming *arguendo* that Sections 354(i) and (j) give DNREC the authority to promulgate regulations specifying the procedures for determining a freeze of the REPSA requirements (which as we have shown above, they do *not*), Sections 5.4 through 5.8 of the 2015 Revised Rules then go far beyond any authority that the General Assembly gave DNREC.

Under proposed Section 5.4, even if DNREC's calculations show that the increase in the REPSA compliance costs hit their thresholds for implementation of a freeze, DNREC is not bound by those calculations to implement a freeze. Instead, the 2015 Revised Rules *then* state that four additional factors will be considered in determining whether to implement a freeze: (1) the overall energy market conditions (whatever *that* means); (2) the avoided cost benefits from the RPS (whatever *those* are); (3) the externality benefits due to the RPS (whatever *that* means);[10] and (4) the economic impacts of the deployment of renewable energy in Delaware (whatever those may be).

None of these factors appears anywhere in Sections 354(i) or (j). And DNREC cannot amend the statute by including them in the 2015 Revised Rules.

In *Cartanza v. Delaware Department of Natural Resources and Environmental Control*, 2008 WL 4682653 (Del. Super Ct. Oct. 10, 2008), the Chancery Court found that DNREC was not permitted to set its own criteria by which SRA designations were to be made when the enabling statute specifically provided that authority to another body, and in so doing DNREC exceeded the authority delegated to it.

In *In the Matter of an Appeal of the Department of Natural Resources and Environmental* Control, 401 A.2d 93 (Del. Super Ct. 1978), the Superior Court found that the Secretary of DNREC could not:

> ... under the guise of his regulatory authority, foreclose the permit securing process and the application of the statutory criteria set forth in §6604. To hold otherwise would be to give the Secretary the power to prevent, permanently, any activity in a wetlands area simply through the designation process as opposed to the permit process. *An administrative agency may not adopt regulations which* are inconsistent with the provisions of the enabling statute or out of harmony with, or *extend the limits of, the Act which created it.*

Id. at 96 (emphasis added).

Similarly, in *Wilmington Country Club v. Delaware Liquor Commission*, 91 A.2d 250, 255 (Del. Super. 1952), the Superior Court found that an agency administering a statute may not,

[10]In the 2014 Proposed Rules, this factor was "the externality benefits of changes in energy markets." For purposes of the DPA's argument, this changes is a distinction without a difference, since, even as changed, it appears nowhere in either Section 354(i) or (j).

by adoption of a rule or regulation, add to a statutorily-granted right a condition that was not expressly stated in the statute.

If the calculation of "Renewable Energy Cost of Compliance" (calculated according to the changed definitions identified in the first section of these Comments) hits the statutory 1%/3% thresholds, then DNREC, in consultation with the Commission, must determine whether to implement a freeze or not. Neither DNREC nor the Commission has the statutory authority to consider any *other* factors. In this regard, the DPA notes that neither Sen. McDowell, Rep. Williams, nor Secretary O'Mara identified or discussed even one of these factors during the Senate and House debates on the REPSA amendments; rather, all emphasized that the *statutory* provisions would act as a "circuit breaker" in the event that the costs of complying with the increased solar/eligible energy resources in Section 354(a) exceeded the statutory 1%/3% thresholds. In light of this, the DPA submits that proposed Sections 5.4 through 5.8 exceed the authority that the General Assembly provided in 26 *Del. C.* §§354(i) and (j).

B. Even if the Statutes Gave DNREC the Authority to Promulgate These Factors, The Proposed Rules Are Opaque as to What Will Inform DNREC's Judgment With Respect to Them and Have a Serious Potential To Be Applied Arbitrarily and Capriciously.

Assuming that Sections 354(i) and (j) *did* give DNREC the authority to include conditions not found in the statute (which they do *not*), it is interesting to compare these factors with the three items that the General Assembly specifically included in the total costs of compliance: the costs associated with any ratepayer funded state (solar) rebate program, REC/SREC purchases, and alternative compliance payments. What do these three things have in common? *They can all be easily ascertained.* We can ascertain the total amount associated with ratepayer-funded rebate programs (such as the Green Energy Fund). We can ascertain the cost to Delmarva of the REC/SREC purchases that it must make in a compliance year to meet the REPSA obligations. And we can ascertain how much was paid in alternative compliance payments. *These numbers are "objective benchmark[s]." See Gibson v. Sussex County Council*, 877 A.2d 54, 76 (Del. Ch. 2005) (County Council's rejection of homeowners' proposed project was arbitrary because there was no objective benchmark against which its "character" judgments could be measured).

But we *cannot* ascertain the amount of the factors set forth in proposed Rule 5.4. There are *no* "objective benchmarks." Despite the definitions of these factors set forth in Rules 5.5 through 5.8, there is *no* source to which we can look to easily determine the exact cost or benefit of these factors. There is *no* source from which we can easily determine overall energy market conditions. There is *no* source from which we can easily determine the exact cost of the avoided cost benefits from the RPS. There is *no* source to which we can look to easily determine the externality benefits of changes from the RPS. And there is *no* source from which we can easily determine the economic impacts of the deployment of renewable energy in Delaware. These costs will be whatever DNREC, *in its sole discretion,* determines them to be.

Furthermore, despite the items identified in Rules 5.5 through 5.8, the 2015 Revised Rules are opaque with respect to what DNREC *will* consider in determining any of the factors.

By their very language, DNREC is not limited to considering these factors. Rules 5.5 through 5.8 say only that DNREC *may* consider them. Perhaps, then it may also consider other (unidentified) factors. And we will not know which factors DNREC considered because the 2015 Revised Rules do not require it to publish the bases for its conclusion.

Finally, nothing in the 2015 Revised Rules provides transparency as to what weight DNREC will assign to each factor. Is it 25% per factor? Will one factor have more weight than another, and if so, which one? Will the application/weighting of the factors change depending on what compliance year is being considered? We have no idea, because the 2015 Revised Rules don't tell us, and again, they don't require DNREC to publish the bases for its conclusion.

The prior discussion demonstrates that the factors in proposed Sections 5.4 through 5.8 could be applied differently from year to year, and this would be arbitrary and capricious. *See, e.g., Gibson*, 877 A.2d at 76 n.78 (noting that restrictive covenants in a housing development are only upheld when they are "clear, precise and capable of even-handed application, and that such covenants are "suspect" due to their tendency "'to be arbitrary, capricious and therefore unreasonable'" (citing *Seabrook Homeowners Association, Inc. v. Gresser*, 517 A.2d 263, 268 (Del. Ch. 1968)). The factors identified in the 2014 Revised Rules are neither clear nor precise – and they are capable of *uneven*-handed application.

In summary, even assuming that DNREC has the authority to promulgate these regulations, in identifying factors that it will consider after finding that the 1%/3% thresholds have been met, it has exceeded *any* authority that the General Assembly gave it. The statutes contain no such factors. Even if the General Assembly did give it the authority to consider these factors, there is no source from which anyone can independently verify the costs that DNREC will assign to them, and the 2015 Revised Rules do not require DNREC to explain how it arrived at its decision. DNREC has provided no explanation of how it will apply the factors, the weight it will assign to each factor, or whether the application and/or weight of the factors will change from year to year. These sections must be eliminated from the Final Rules.

VII. Conclusion.

Publicly-available information indicates that the cost caps in Sections 354(i) and (j) have already been met and a freeze should be implemented now. But, assuming that DNREC even has the authority to even promulgate these rules, every version of proposed rules that DNREC has proffered has made it obvious that it is doing everything it can to ensure that a freeze will *never* be declared. This is contrary to the General Assembly's intent. In amending the REPSA to include Sections 354(i) and (j), the General Assembly struck a balance between the goals of promoting renewable resources and ensuring that Delmarva customers could afford to pay their electricity bills. The 2015 Revised Rules – as did the versions preceding it - focus only on the promotion of renewable energy.

Based on the foregoing reasoning and authorities, the DPA submits that DNREC lacks the authority to promulgate the 2015 Revised Rules. Assuming only for the sake of argument that DNREC does have such authority, then the following changes to the 2015 Revised Rules are required:

(1) Sections 5.2, 5.3, 6.1 and 7.3 must be revised to provide that the statutorily-required consultation between DNREC and "the Commission" will be with the actual Public Service Commission, not the Commission's staff.

(2) The costs associated with Delmarva's use of the QFCP energy costs to fulfill its REC and SREC requirements must be included in calculating the total cost of compliance with the REPSA. Therefore, the definitions of QFCP and QFCPP that were in the 2014 Proposed Rules should be reinstated, and Sections 4.2 and 4.3 should be revised to include the cost of QFCPP offsets to the RPS and solar carve-out in the cost of compliance with the REPSA.

(3) The definition of "Total Retail Costs of Electricity" must be changed to remove the reference to "transmission, distribution and delivery costs" in the calculation of that total cost. Alternatively, if transmission, distribution and delivery costs remain in the definition of "Total Retail Costs of Electricity," then the "Renewable Energy Cost of Compliance" must be amended to include "transmission, distribution and delivery costs" to enable a fair comparison.

(4) Sections 5.4 through 5.8 must be removed because the legislation does not identify these criteria as a basis for either supporting or rejecting a freeze. In including them as considerations whether to implement a freeze or not when the statutory percentages would warrant a freeze, DNREC has exceeded the authority provided to it. Even if DNREC did have authority to assess whether a freeze should be implemented after consideration of these factors, the 2015 Revised Rules do not identify how it will apply the factors, the weight it will assign to each factor, or whether the application and/or weight of the factors will change from year to year, and therefore are not capable of clear, precise and even-handed application from year to year.

Respectfully submitted

/s/ *Regina A. Iorii*
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Counsel for the Delaware Division of the Public Advocate

Dated: November 13, 2015

ATTACHMENT 2

Subject: RE: DPA actions regarding REC cost caps inconsistency with Merger Settlement Agreement

Date: Monday, December 7, 2015 at 10:36:51 AM Eastern Standard Time

From: Iorii, Regina (DOJ)

To: Firestone, Jeremy Mark, Bonar, David L (DOS)

CC: Schoell, Joseph C., Donoghue, Julie M (DOS), McGonigle, Thomas P., 'fmurphy@msllaw.com', 'maeve.tibbetts@monitoringanalytics.com', 'todd.goodman@pepcoholdings.com', 'jeffrey.mayes@monitoringanalytics.com', 'bburcat@marec.us', 'jamesgeddes@mac.com', 'jim.black@consultant.com', 'lwelde@cleanair.org', 'sholly@bergerharris.com', Scott, Devera (DOJ), Noyes, Thomas G. (DNREC), Howatt, Robert (DOS), Maucher, Andrea (DOS)

Jeremy –

Please take whatever action you think you need to take.

Gina

Regina A. Iorii
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From: Firestone, Jeremy Mark [mailto:jf@udel.edu]
Sent: Saturday, December 05, 2015 4:41 PM
To: Iorii, Regina (DOJ); Bonar, David L (DOS)
Cc: Schoell, Joseph C.; Donoghue, Julie M (DOS); McGonigle, Thomas P.; 'fmurphy@msllaw.com'; 'maeve.tibbetts@monitoringanalytics.com'; 'todd.goodman@pepcoholdings.com'; 'jeffrey.mayes@monitoringanalytics.com'; 'bburcat@marec.us'; 'jamesgeddes@mac.com'; 'jim.black@consultant.com'; 'lwelde@cleanair.org'; 'sholly@bergerharris.com'; Scott, Devera (DOJ); Noyes, Thomas G. (DNREC); Howatt, Robert (DOS); Maucher, Andrea (DOS)
Subject: Re: DPA actions regarding REC cost caps inconsistency with Merger Settlement Agreement

Dear Gina,

Thank you for your prompt response. Unfortunately, it does not move us closer to a resolution.

1. With regard to paragraph 110, the sentence which you reproduce, you italicize one portion while neglecting the remainder which states that you are not prohibited from arguing policies "before the Commission." Thus, the savings clause by its own terms does not apply to actions before other bodies including DNREC.

2. Moreover, even as applied to other proceedings before the Commission it is clearly not intended to allow a settling party to collaterally attack a provision in the settlement. While it would not allow you to collaterally attack, for example, the undertaking of the onshore wind or natural gas studies (para. 9) in another proceeding before the commission, you would be permitted to argue against expenditures related to actually securing new natural gas or onshore wind generation or the signing of PPAs related thereto should those studies lead others to conclude that there is merit to such new generation/PPAs. Likewise, Delmarva Power is bound to undertake a depreciation study under paragraph 81, and a settling party could not collaterally attack that obligation; the parties would however remain free to argue the implications of that study in the next rate base, and would be free to argue that such a study is meaningless even though it was agreed to be undertaken. Or take paragraph 82, where the parties commit to closing docket 13-152 given SAIDI and budget commitments specified therein. The parties could not turn around in docket 13-152 and take a position that was opposite to the settlement simply because it is in another docket. I could go on. But it is clear if everyone can collaterally attack the settlement in any other forum, including Commission dockets, there is no real settlement.

3. You are seeking to freeze the REC requirements. The percentages in the law are 11.5% in 2014, 13% in 2015, 14.5% in 2016, 17.5% in 2017. Under an "postponement of the increase" view of a "freeze", if RECs were frozen as of 2014, and were for the purposes of this example unfrozen in 2017, they would not be set at 17.5% but at 13% in 2017 (my view is to the contrary, that a freeze does not postpone but merely freezes in place the percentage required during pendency of the freeze; when lifted, the statutory percentages in the given years then control). Given that you and others are advancing a "postponement of the increase view" your actions in pushing for a freeze are contributing to risk related to the 2017-2018 tranche and thus compromise your commitment to the 2017-18 tranche. The other tranches are likewise threatened.

4. In your pre-hearing brief, you, for example, represented to the Commission and criticized me for claiming that the renewable energy provisions in the Settlement were "meager," describing such criticism as "invalid." I have recently come to learn that in a separate proceeding it appears that in the past you did, and you are now presently continuing to seek to have the RPS law interpreted in a way that would render the renewable energy provisions a nullity. You cannot have it both ways. The Settlement cannot be both robust and a nullity.

5. I think we can all agree that the law is the law. And if, e.g., a court issues an order freezing RECs and it impacts a REC tranche, then the parties to the settlement will have to figure out what it means for that REC tranche. But it is a different matter when a party to the settlement affirmatively (and in this case, relentlessly) seeks an interpretation of the law and seeks to implement a freeze that if instituted places in jeopardy an integral part of the settlement.

Again, I would ratter that we resolve this amicably and I see nothing in my December 2 email on its face or that could be implied from the text as an attempt to impugn either your or David's integrity, so I would hope that cooler heads prevail. Indeed as set out in that email and this one, DPA's actions require no embellishment, but speak for themselves.

Thus, through this email I wish to afford you and David a further chance to reflect on what has transpired, address the damage done by your actions, and agree to adjust your future activities accordingly. If after reflection, we are not able to come to an understanding, than it will be left it to the Commission and others to decide on the appropriateness of DPA's actions and the consistency of those actions with its obligations under the Settlement Agreement. I will wait till close of business Wednesday in an attempt to resolve this matter. If we are unable to agree by then, it is my intent to file my motion later in the week for consideration at the Commission's January 5, 2016 meeting.

Regards,

Jeremy

From: "Iorii, Regina (DOJ)" <regina.iorii@state.de.us>
Date: Thursday, December 3, 2015 at 10:58 AM
To: jeremy firestone <jf@udel.edu>, "Bonar, David L (DOS)" <David.Bonar@state.de.us>
Cc: "Schoell, Joseph C." <Joseph.Schoell@dbr.com>, "Donoghue, Julie M (DOS)" <Jo.Donoghue@state.de.us>, Tom McGonigle <Thomas.McGonigle@dbr.com>, "'fmurphy@msllaw.com'" <fmurphy@msllaw.com>, "'maeve.tibbetts@monitoringanalytics.com'" <maeve.tibbetts@monitoringanalytics.com>, "todd.goodman@pepcoholdings.com" <todd.goodman@pepcoholdings.com>, "'jeffrey.mayes@monitoringanalytics.com'" <jeffrey.mayes@monitoringanalytics.com>, "bburcat@marec.us" <bburcat@marec.us>, Jim Geddes <jamesgeddes@mac.com>, jim black <jim.black@consultant.com>, Logan Welde <lwelde@cleanair.org>, "'sholly@bergerharris.com'" <sholly@bergerharris.com>, "Scott, Devera (DOJ)" <Devera.Scott@state.de.us>, "Noyes G." <Thomas.Noyes@state.de.us>, "Howatt, Robert (DOS)" <Robert.Howatt@state.de.us>, "Maucher, Andrea (DOS)" <andrea.maucher@state.de.us>
Subject: RE: DPA actions regarding REC cost caps inconsistency with Merger Settlement Agreement

Dear Jeremy:

We agree that we are bound by the provisions of the Settlement Agreement since the Commission has approved it. (Paragraph 110). However, you conveniently ignore the *final* sentence of Paragraph 110, which provides: "None of the Settling Parties shall be prohibited from or prejudiced in arguing a different policy or position before the Commission in any other proceeding, *as such agreements pertain only to this matter and to no other matter*." (Emphasis added). This provision would seem to dispose of your arguments entirely.

But paragraph 84 does not support your arguments either. First: the wind REC commitment starts with the *2017-18* compliance year and runs to the *2023-24* compliance year. Our comments address *previous and current compliance years*. Compliance years 2014-15 (the previous compliance year), 2015-16 (the current compliance year) and 2016-17 (the next compliance year) are not addressed in Paragraph 84. Second: Paragraph 84 provides that "...The Settling Parties agree that if circumstances or conditions change (including *but not limited to* a material change in the projected load of Delmarva Power such that fewer RECs are required, or a substantial change in the cost of RECs through the spot market such that additional spot-market purchases in lieu of long-term contract purchases would be prudent), they will work in good faith with each other and present any proposed modification to the Commission as may be warranted by those changed conditions." (Emphasis added). A declaration of a freeze would be a classic changed circumstance. In the event that the merger is consummated and the law remains the same with respect to a potential freeze by the time Delmarva is required to issue an RFP for the 2017-18 compliance year, and a freeze has been declared, the DPA will comply with its obligations under the Settlement Agreement and raise that issue with the parties.

Last, settlements cannot supersede statutory law.

The Settlement Agreement does not constrain the DPA from taking actions that it believes necessary to protect the consumers that are its constituents. By its own terms it applies to *the merger case* and *the merger case only.* But even if it did apply more broadly, the DPA has done nothing that is inconsistent with its terms.

If you think you need to bring something before the Commission, we cannot stop you. But if you are considering alleging that the DPA was acting in anything other than good faith in negotiating the Settlement Agreement, you had better have solid evidence to back that allegation up. Neither my client nor I take kindly to allegations impugning our integrity.

Gina

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From: Firestone, Jeremy Mark [mailto:jf@udel.edu]
Sent: Wednesday, December 02, 2015 5:24 PM
To: Iorii, Regina (DOJ); Bonar, David L (DOS)
Cc: Schoell, Joseph C.; Donoghue, Julie M (DOS); McGonigle, Thomas P.; 'fmurphy@msllaw.com'; 'maeve.tibbetts@monitoringanalytics.com'; 'todd.goodman@pepcoholdings.com'; 'jeffrey.mayes@monitoringanalytics.com'; 'bburcat@marec.us'; 'jamesgeddes@mac.com'; 'jim.black@consultant.com'; 'lwelde@cleanair.org'; 'sholly@bergerharris.com'; Scott, Devera (DOJ); Noyes, Thomas G. (DNREC); Howatt, Robert (DOS)
Subject: DPA actions regarding REC cost caps inconsistency with Merger Settlement Agreement
Importance: High

Dear David and Gina,

I write to express my concern that the Delaware Public Advocate (DPA) is taking actions regarding the REC cost caps that are inconsistent with the Settlement Agreement and its obligations under the Settlement Agreement. In short, DPA asserts that a REC freeze "should be implemented now." (p. 15 in attached), yet entered into and praised a settlement with Exelon as being "proper" and "consistent with the public interest" (paragraph 1) that commits Exelon to purchase three trenches of RECs from the equivalent of 40MW each of wind energy (paragraph 84). The positions that it is advancing if successful could render paragraph 84 a nullity.

Paragraph 110 goes on to state that:

> "This Settlement Agreement contains terms and conditions above and beyond the terms contained in the Application, each of which is interdependent with the others and essential in its own right to the signing of this Settlement Agreement. Each term is vital to the Settlement Agreement as a whole, since the Settling Parties expressly and jointly state that they would not have signed the Settlement Agreement had any term been modified in any way."

Paragraph 108 states that "The Settling Parties agree to support approval of the Merger upon the terms set forth in this Settlement Agreement in any proceedings before the Commission regarding approval of the Merger.

DPA's actions are jeopardizing an "interdependent" and "essential" aspect of the settlement—RECs—which are "vital" and which effectively result in a modification and a statement of non-support.

I would like this to be resolved among the parties to this docket without resort to the Commission, but if it cannot be resolved satisfactorily, I will take necessary and appropriate action before the Commission.

Jeremy

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, EXELON CORORPATION, PEPCO HOLDINGS INC., PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *Del.* C. §§ 215 AND 1016 (FILED JUNE 18, 2014)	))))))))))	PSC DOCKET NO. 14-193

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2015, that on behalf of Jeremy Firestone, Pro Se, I filed **MOTION FOR CEASE AND DESIST ORDER RESTRAINING THE DELAWARE DIVISION OF PUBLIC ADVOCATE FROM TAKING ACTIONS ANTAGONISTIC TO THE AMENDED SETTLEMENT AGREEMENT** with Delafile and provided a copy of the same on all persons on the email service list by email attachment.

Respectfully submitted,

Jeremy Firestone
11 December 2015